**April 20, 2020**

**Submitted in response to Wireline Competition Bureau Seeks To Refresh Record In Restoring Internet Freedom And Lifeline Proceedings In Light Of The D.C. Circuit's *Mozilla* Decision. WC Docket Nos. 17-108, 17-287, 11-42.**

**Comment by Concerned Berkeley Law Students**[1]

## I. Executive Summary

Our comment responds to the FCC's public notice of request for comment (RFC) following *Mozilla Corp. v. FCC* by answering specific questions about the Lifeline program.[2] The RFC requested public comment on how the D.C. Circuit's *Mozilla* decision[3] on the FCC's Restoring Internet Freedom Order (RIFO)[4] impacts public safety, pole attachments, and the Lifeline program. This memo answers the Commission's questions presented in the RFC regarding Lifeline. Our comment addresses questions one, two, and four of the FCC's four questions regarding Lifeline: (1) how the *Mozilla* decision bears on the 2017 Lifeline NPRM and whether § 254(e) extends to broadband, (2) whether there are other legal authorities the FCC can rely on to provide Lifeline broadband support, and (4) whether there are any other aspects of the Lifeline program that go for or against the FCC's decision to reclassify broadband as an information service.

First, regarding the FCC's first question, there is likely no authority under § 254(e). The FCC claims there is legal authority for Lifeline broadband support because the funding is only offered to broadband provided over facilities-based networks that support voice services.

[1] The views set forth herein are personal and do not necessarily reflect those of Berkeley Law or its other students or faculty.
[2] *Wireline Competition Bureau Seeks To Refresh Record In Restoring Internet Freedom And Lifeline Proceedings In Light Of The D.C. Circuit's* Mozilla *Decision*, WC Docket Nos. 17-108, 17-287, 11-42, Public Notice (F.C.C. 2020).
[3] *Mozilla Corp. v. FCC,* 940 F.3d 1 (D.C. Cir. 2019).
[4] *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2017).

However, the FCC's claims are unreasonable because in practice the FCC plans to provide zero dollars of support for voice service by the end of 2021. The FCC also cannot apply § 254(e) authority used to support broadband in Connect America Fund (CAF) to Lifeline due to fundamental differences in the programs. Further, the D.C. Circuit's interpretation of § 254(e) in *Mozilla* is at odds with the Tenth Circuit's interpretation of the statute in *In re: FCC 11-161*. Therefore, the FCC needs to provide new rationale, different from what it has asserted in *In re: FCC 11-161* and the 2017 Lifeline NPRM, in order to address the D.C. Circuit's concerns with how § 254(e), a statute tethered to common-carrier status, still applies with RIFO broadband reclassification.

Second, regarding the FCC's second question, we consider whether the FCC may use authority ancillary to § 254(e), direct and ancillary authority under §§ 254(b) and 254(c), and direct authority under § 706. In our opinion, section 706 is most promising because it is least restricted to Title II telecommunications services. Ancillary authority does little to overcome the shortcomings of § 254(e). Section 254(b) is a policy statement, and thus neither directly authorizes FCC action nor provides a sufficient hook for ancillary authority. Section 254(c) allows the FCC to define "universal service" taking into account advances in information services, but it ultimately only allows the FCC to define universal service as a level of Title II telecommunications services. Finally, section 706 may apply to Lifeline because it authorizes the FCC to encourage deployment of broadband infrastructure regardless of its classification as a Title I or Title II service. However, section 706 depends on whether the D.C. Circuit views the Lifeline program as a common carrier regulation on broadband providers.

Third, regarding the FCC's fourth question, it is our view that the reclassification of broadband services as a Title I information service will be detrimental to the Lifeline program

and all other universal service programs that provide broadband support. The impact of losing these programs would be extremely harsh for low-income users relying on them for broadband service. These programs are hallmarks of the FCC's purpose and duty, to make available to all the people of the United States, without discrimination, wire and radio communication service at reasonable charges.

## II. Response to the Specific FCC Questions

### A. Question 1: How, if at all, does the *Mozilla* decision bear on the 2017 Lifeline NPRM, which relied on § 254(e) to provide Federal support to eligible telecommunications carriers to provide Lifeline broadband service? For example, the Court in Mozilla invited the Commission to explain how its authority under section 254(e) could extend to broadband, "even 'over facilities-based broadband-capable networks that support voice service' now that broadband is no longer considered to be a common carrier." We seek to refresh the record in light of the Court's invitation.

It is unlikely that the FCC has legal authority under § 254(e) to regulate and provide broadband services through the Lifeline Program now that broadband is reclassified as an information service. In the 2017 Lifeline NPRM, the FCC relied on the second sentence of § 254(e), that eligible telecommunications carriers (ETCs) receiving universal service support "shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."[5] However, the FCC's interpretation of § 254(e) is no longer valid because of the impact of broadband reclassification as an information service and because the interpretation relies on case law determined prior to reclassification.

#### 1. The 2017 Lifeline NPRM lacks legal authority because RIFO reclassification eliminates extending § 254(e) to broadband.

In the 2017 Lifeline NPRM, the FCC concluded it had authority under § 254(e) to provide Lifeline funding to ETCs that offered broadband service over facilities-based networks

[5] 47 U.S.C. § 254(e) (2018).

that supported voice services.[6] The FCC determined it had legal authority to offer Lifeline broadband support because the networks receiving the broadband support would also support voice service, which is a service Universal Service Fund (USF) support is intended for.[7] Therefore, because the FCC provides Lifeline funding only to facilities that support voice services, the support would be used for "facilities and services for which [USF] support is intended."[8]

In response to *Mozilla*, the FCC could argue that its 2017 Lifeline NPRM legal authority for broadband support remains valid, because voice service is still categorized as a telecommunications service. According to this line of argument, Lifeline broadband funds still only go to telecommunications facilities and services, which USF support is intended for. The Tenth Circuit concluded that § 254(e) does not bar the FCC from conditioning USF funding on recipients' agreement to provide broadband Internet access services.[9] Therefore, the FCC can offer Lifeline broadband support to ETCs voice services facilities with the condition that those facilities also offer broadband services. Furthermore, because Lifeline broadband support only goes to facilities that provide voice services, the FCC's legal authority to offer broadband support does not depend on the regulatory classification of broadband Internet service.[10]

However, that argument ignores the reality of the FCC's implementation of the Lifeline program and the effects of broadband reclassification as an information service, an issue that the D.C. Circuit specifically remanded the FCC to consider. According to the FCC's website on the Lifeline program, the FCC plans to phase out Lifeline voice support to zero dollars by December

[6] *Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry*, 32 FCC Rcd 10475, 10502, para. 77 (2017) (*2017 Lifeline NPRM*).
[7] *2017 Lifeline NPRM*, at 10503, para. 77.
[8] 47 U.S.C. § 254(e).
[9] *In re: FCC 11-161*, 753 F. 3d. 1015, 1047-48 (10th Cir. 2014).
[10] *2017 Lifeline NPRM*, at 10503, para. 77.

1, 2021.[11] That means the FCC plans to change the Lifeline program to be a broadband only subsidy within the next year and a half. Lifeline support is designed as a subsidy given to ETCs to offer affordable services to low-income consumers.[12] It is unreasonable for the FCC to claim that Lifeline support overall would be used to benefit ETC's voice facilities and services when in practice, the FCC plans to provide zero dollars of support for voice service.

Furthermore, RIFO's reclassification of broadband as an information service challenges the FCC's legal authority to specifically designate $9.25 per month of Lifeline broadband support to ETCs. According to the FCC's Lifeline website, the Lifeline program separates its reimbursements to ETCs based on whether broadband or voice support is offered, $9.25 per month for broadband and $7.25 per month for voice.[13] So for Lifeline support, the FCC expects an ETC to be reimbursed for independent amounts for serving a voice versus a broadband customer. The FCC claims there is § 254(e) legal authority for broadband support because the funding only is offered for broadband provided over facilities-based networks that support voice services.[14] However, this does not address whether the FCC has the ability to separately designate reimbursement amounts for voice and broadband service. If the FCC were offering general Lifeline support to ETCs who then can choose how to use the funding, this wouldn't be an issue. But when the FCC specifically designates USF funds for broadband and an ETC is reimbursed specifically for offering broadband service, the funds are then only to support offering broadband. This is at the heart of the issue that the D.C. Circuit highlights in *Mozilla*, which is how can § 254(e), a statute that tethers eligibility for support to offering

[11] *Lifeline Program for Low-Income Consumers ("Lifeline Program")*, FCC (last updated April 17, 2020), https://www.fcc.gov/general/lifeline-program-low-income-consumers.
[12] *Id.*
[13] *Id.*
[14] *2017 Lifeline NPRM*, at 10502, para. 77.

telecommunications services, provide any legal authority to fund broadband, an information service. Because of the irreconcilable differences between the FCC's asserted authority under § 254(e) and the FCC's actual implementation of the Lifeline program, a court after RIFO and *Mozilla* would be highly skeptical and likely unconvinced of the FCC's legal authority in the 2017 Lifeline NPRM for broadband support.

2. Lifeline cannot rely on the § 254(e) authority used in the Connect America Fund for broadband due to fundamental differences in the programs.

Alternatively in response to *Mozilla*, the FCC could analogize its authority to support broadband services in Lifeline to its legal authority to offer broadband support through the Connect America Fund (CAF). The Tenth Circuit's *In re: FCC 11-161* upheld the FCC's interpretation of "facilities" and "services" as two distinct items in which Congress has authorized the FCC to designate USF funds for.[15] Thus, § 254(e) "granted the [FCC] the flexibility not only to designate the types of telecommunications services for which support would be provided, but also to encourage the deployment of types of facilities that will best achieve the principles set forth in section 254(b)," the Universal Service Principles. This interpretation of § 254(e) authorized the FCC to condition USF funding in CAF on the recipients' agreement to build facilities that can provide broadband Internet services.[16]

Similarly, the FCC can condition Lifeline program support on recipients' agreement to build facilities that can provide broadband Internet service, though this has a serious shortcoming. Under this line of argument, the FCC would be encouraging the deployment of a type of telecommunications facility that supports broadband rather than funding an information service. However, this argument ignores the reality that Lifeline support is intended as a subsidy

[15] *In re: FCC 11-161*, 753 F. 3d. at 1046-47.
[16] *Id.* at 1047-48.

for an ETC to offer affordable services to low-income consumers, not to build network facilities.[17] In contrast, CAF is actually designed to subsidize the cost of building facilities such as new network infrastructure or performing network upgrades.[18] This fundamental difference between CAF and Lifeline raises serious doubts of the applicability of CAF's interpretation of § 254(e) as legal authority for broadband support in Lifeline. Thus, a court would find it unconvincing that Lifeline support, a subsidy for voice and broadband services, is actually designed to encourage the building of infrastructure and facilities.

3. The D.C. Circuit's interpretation of § 254(e) is at odds with the Tenth Circuit interpretation of § 254(e), which the FCC relies on.

A final fatal flaw of relying on the second sentence of § 254(e) is that the Tenth Circuit and the D.C. Circuit disagree on whether the FCC can condition USF funding for facilities on a recipient's agreement to provide broadband services. In both *In re: FCC 11-161* and the 2017 Lifeline NPRM, the FCC relies on its interpretation of § 254(e) upheld by the Tenth Circuit to allow conditioning of telecommunications "facilities" funds on providing broadband service.[19] However, the Tenth Circuit ruled on this issue before broadband was reclassified as an information service. In contrast, the D.C. Circuit in *Mozilla* found that "Congress had tethered Lifeline eligibility to common-carrier status," especially since to receive Lifeline support, "an entity must be designated as an eligible telecommunications carrier."[20] Since, "broadband's eligibility for Lifeline subsidies turns on its common carrier status," RIFO reclassification "facially disqualifies broadband from inclusion in the Lifeline program."[21] If the FCC is

[17] *Lifeline Program*, *supra* note 11.
[18] *Connect America Fund Phase II FAQS*, FCC, https://www.fcc.gov/consumers/guides/connect-america-fund-phase-ii-faqs (last accessed April 19, 2020).
[19] *See In re: FCC 11-161*, 753 F. 3d. at 1047-48; *2017 Lifeline NPRM*, at 10502-03, para. 77.
[20] *Mozilla*, 940 F. 3d. at 68.
[21] *Mozilla*, 940 F. 3d. at 69.

permitted to condition funding for telecommunications facilities on providing broadband services, then the telecommunications limitation of § 254(e) identified by the D.C. Circuit would be rendered meaningless. Therefore, the FCC needs to provide new rationale, different from what it has previously asserted in *In re: FCC 11-161* and the 2017 Lifeline NPRM, in order to address the specific issues with § 254(e) the D.C. Circuit remanded to the FCC.

Overall, without addressing these critical issues with using § 254(e) as legal authority, any response that the FCC offers will be insufficient to fully answer the *Mozilla* court's remand to determine RIFO's effect on the 2017 Lifeline NPRM and if § 254(e) applies to broadband.

### B. Question 2: Are there other sources of authority that allow the Commission to provide Lifeline support for broadband services?

Even if § 254(e), discussed above, no longer directly authorizes Lifeline to provide broadband services, there are other sources of authority to consider, such as authority ancillary to § 254(e), direct and ancillary authority under 47 U.S.C. §§ 254(b) and 254(c), and direct authority under § 706 of the Telecommunications Act of 1996 (codified as 47 U.S.C. § 1032, hereinafter "§ 706"). Some are more promising than others, and each of them has some problems that may need to be resolved, but § 706 may be most promising because it is least restricted to Title II telecommunications services.

Ancillary authority is not limitless. In order for regulations to be authorized by Title I ancillary authority, 47 U.S.C. § 154(i), the regulations must be "reasonably ancillary" to an "express statutory delegation of authority" and not just to mere "policy statements."[22] When broadband internet was classified as a Title II telecommunications service, the Lifeline program was easily justified under express statutory delegations of authority in Title II governing

[22] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2013).

common carriers, such as §§ 201 and 205, combined with ancillary authority.[23] However, if broadband internet is classified as a Title I information service, not only do provisions governing common carriers no longer directly apply, but it is more difficult to justify regulating information services as ancillary to the power to regulate common carriers. In particular, ancillary authority cannot amount to regulating an information service like a common carrier; the D.C. Circuit held that when broadband is classified as an information service, the FCC "would violate [§ 153(51)] were it to regulate broadband providers as common carriers."[24] Section 153(51) states that a telecommunication carrier may be regulated like a common carrier "only to the extent that it is engaged in providing telecommunications services," not information services.[25]

1. Authority under Section 254(e)

Section 254(e) may suffice as a "hook" for ancillary authority, but ancillary authority does not overcome the shortcomings of § 254(e)'s direct authority. Section 254(e) provides that any "carrier that receives [universal service] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended," as discussed in the previous section.[26] An argument can be made that this provision is an express statutory delegation of authority, and thus a sufficient hook for ancillary authority, because it authorizes the FCC to have an "intention" that controls how funds are used. Indeed, the Tenth Circuit found that the FCC is permitted to have intentions directed to information services.[27] Ancillary authority may help buttress arguments made in the previous section: (1) that networks

[23] *See In the Matter of Lifeline & Link Up Reform & Modernization: Third Report and Order, Further Report and Order, and Order on Reconsideration* ("*2016 Lifeline Order*"), 31 F.C.C. Rcd. 3962, 4123-24 (2016).
[24] *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014).
[25] 47 U.S.C. § 153(51).
[26] 47 U.S.C. § 254(e).
[27] *See In re FCC 11-161* (finding it reasonable for such funds to be intended for broadband facilities as long as the facilities also support telecommunication services).

receiving Lifeline support all have facilities that support voice service, and (2) that Lifeline support can be seen as encouraging deployment of telecommunications facilities. However, the weaknesses discussed in the previous section also weaken claims to ancillary authority, namely, that the Lifeline program in reality is phasing out support for voice services and that the Lifeline program is intended to subsidize low-income consumer subscriptions rather than encourage broadband build-out. It is difficult to make the argument that subsidizing broadband is ancillary to subsidizing voice services if the latter is being phased out. The second argument for ancillary authority, that Lifeline support can be seen as encouraging deployment of telecommunications facilities, may have more promise if Lifeline support is intended to offset the costs of CAF fees, because CAF fees are used to subsidize telecommunications facilities build-out. Indeed, this structure was the original intention of the Lifeline program in 1985.[28]

2. Authority under Section 254(b)

Another prospective source of authority for Lifeline is the Universal Service Principles, codified under Title II at 47 U.S.C. § 254(b). In particular, this statute states that "the Commission shall base policies for the preservation and advancement of universal service" on at least two principles: first, "Quality services should be available at just, reasonable, and *affordable rates*," and second, "Access to advanced telecommunications *and information services* should be provided in all regions of the Nation."[29] Even if broadband is classified as an information service, section 254(b) explicitly states that "information services" should be provided to all at "affordable" rates, which is an idea in alignment with Lifeline's goal of providing broadband to low-income consumers.[30]

[28] *See MTS and WATS Market Structure; and Establishment of a Joint Board*; Amendment, 50 Fed. Reg. 939 (1985).
[29] 47 U.S.C. § 254(b)(1)–(2) (emphasis added).
[30] 47 U.S.C. § 254(b)(1)–(2).

However, section 254(b) is problematic as a source of authority. The first problem is that it is not clear whether § 254(b) is merely a congressional policy statement that has no effect on the FCC's authority. Its only directive is that the FCC "shall base [universal service] policies on the following principles." However, even if § 254(b) is interpreted as being directed to the scope of the FCC's authority, it may still be insufficient authority. Indeed, section 254(b) appears to be a *restriction* of authority rather than a delegation of it, requiring the FCC to base its universal service policies on certain principles. This restriction makes sense in the broader context of § 254, which provides clearer delegations of authority such as directing the FCC to define the technological scope of universal service (§ 254(c)) and authorizing carrier contributions (§ 254(d)). In order for § 254(b) to represent a sufficient authorization to provide broadband under the Lifeline program, the FCC would need to interpret § 254(b) as being directed to the scope of the FCC's powers *and further* as expanding those powers rather than contracting them. This interpretation is expansive and unlikely to survive judicial review.

Ancillary authority likely does not save § 254(b). To the extent that § 254(b) is a congressional policy statement, it is an insufficient delegation of authority under *Comcast* to be a hook for ancillary authority. Moreover, to the extent that § 254(b) contracts the FCC's powers rather than expanding them, it cannot be a hook for ancillary authority.

3. Authority under Section 254(c)

Another prospective source of authority for Lifeline broadband support is 47 U.S.C. § 254(c). Within § 254(c), Congress included mechanisms that allow the Commission to consider (1) an evolving level of services and advancements in technology and (2) the extent to which the services are essential to the public, market, and deployment. However, § 254's limitation of

universal service defined as a telecommunications service likely spoils this statute as a source of authority for Lifeline broadband support.

Section 254(c)(1) directs the FCC to define universal service as "an evolving level of telecommunications service…taking into account advances in telecommunications and information technologies and services."[31] This one sentence provides both a powerful argument for and a powerful argument against authorizing Lifeline broadband support. One the one hand, Congress specifically defined universal service to take into account advances in *information technologies and services*. Taking into account information services like broadband may authorize Lifeline broadband. On the other hand, Congress specifically limited the definition of universal service to a "level of telecommunications services," which seems to limit universal service support to services regulated under Title II.

Congress's explicit authorization of taking into account information services supports the FCC in providing Lifeline support in line with *Mozilla* and its reliance on *Brand X*.[32] In *Mozilla*, the Supreme Court concluded in view of *Brand X* that the FCC "permissibly classified broadband Internet access as an 'information service' by *virtue of the functionalities afforded by DNS and caching*."[33] This is because the "agency reasonably concluded that, notwithstanding the availability of alternative sources of DNS, a market where "the vast majority of ordinary consumers… rely upon the DNS functionality provided by their ISP… as part and parcel of the broadband Internet access service… meets Brand X's requirements for functional integration.."[34]

This reasoning supports authorizing Lifeline because, today, the backbone physical infrastructure is the same for broadband and telecommunication services. In fact, the backbone

[31] 47 U.S.C. § 254(c)(1).
[32] *Mozilla*, 940 F.3d at 22; *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).
[33] 940 F.3d at 35 (emphasis added).
[34] *Id.* (quotations omitted).

physical infrastructure's primary purpose is to carry information services and only secondarily to provide support to carry legacy telecommunications traffic. This means that, as described in *Mozilla* and *Brand X* in the context of DNS, an advancement in information services and technologies is supporting a telecommunications service. Even more directly, in the advent of VOIP telecommunication services, the last mile physical infrastructure is also continually becoming the same for both telecommunication and information services. As cable or fiber lines are run directly into homes for broadband, they are increasingly becoming the cables that support legacy telecommunications. Recently, the number of VOIP subscribers has eclipsed the number of end-user switched access lines and is only growing.[35] These VOIP telecommunication services are regularly, if not uniformly, provided via a modem and/or router that connects to the VOIP service through an internet connection. Thus, these cable and fiber lines, which are advancements in information technologies and services, are supporting and *advancing* a telecommunications service as well. Even more than just support, telecommunications services rely on broadband advances and deployment and without these cable and fiber lines, primarily meant for broadband, these advances would not exist. Thus, because advances in information services and technologies are directly supporting advances in telecommunications services, § 254(c) may support providing Lifeline broadband support.

Second, § 254(c)(1) defined that:

> universal service support mechanisms shall consider the extent to which such telecommunication services…
>
> (A) are essential to education, public health, or public safety;

[35] "In Dec 2018, there were "44 million end-user switched access lines in service [and] 67 million interconnected VoIP subscriptions" and "[o]ver the [preceding] three-year period... VoIP subscriptions increased at a compound annual growth rate of 4%... and retail switched access lines declined at a compound annual growth rate of 12% per year. *Voice Telephone Services: Status as of December 31, 2018*, FCC Office of Economics and Analytics (March 2020).

> (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
> (C) are being deployed in public telecommunications networks by telecommunications carriers; and
> (D) are consistent with the public interest, convenience, and necessity.[36]

Moreover, the reasoning applied to support telecommunications services also applies to broadband. Here, both the telecommunications service (voice service) and the information service (broadband) provided by Lifeline are (A) "essential to education, public health, [and] public safety;"[37] (C) "are being deployed in public telecommunications networks by telecommunications carriers;"[38] and (D) "are consistent with the public interest, convenience, and necessity."[39]

In consideration of (A), (C), and (D), telecommunication services, which are deployed widely via broadband capable networks today, are inherently essential to education, public health and public safety. Without the broadband provided by the Lifeline program, many members of the American public, particularly those who are low-income, would simply lose access to essential educational, public health, and public safety resources. COVID-19 pandemic demonstrated the absolute need for internet connectivity in modern American society. Broadband access during a shelter-in-place is often the only way for American's to access basic education, health, and other necessary resources. Thus, to participate in our modern society, broadband is a necessity, not a convenience.

However, all of the above arguments have a serious shortcoming: § 254(c) on its face limits the definition of universal service to a "level of telecommunications services." Indeed, at

[36] 47 U.S.C. § 254(c)(1).
[37] 47 U.S.C. § 254(c)(1)(A).
[38] 47 U.S.C. § 254(c)(1)(C).
[39] 47 U.S.C. § 254(c)(1)(D).

issue here is the FCC's reclassification of broadband internet as a Title I information service rather than a Title II telecommunications service. These classifications are distinct, and one cannot be treated like the other.[40] This is a serious obstacle to § 254(c) authorizing Lifeline broadband support while broadband is classified as a Title I information service.

An argument to ancillary authority may help strengthen § 254(c) arguments, but it too suffers from the same shortcomings. There remain at least two problems. First, universal service must still be defined as a "level of telecommunications services," which, as discussed above, does not seem to allow for information services.[41] The statutory structure and the courts have made clear that Title I information services are separate and distinct from Title II telecommunications services.[42] Second, section 254(c) on its own merely concerns the scope of a definition and does not independently authorize funding. Other statutes authorize universal service funds, but § 254(e) reserves universal service funds for telecommunication carriers and their facilities and services. At best, ancillary authority under § 254(c) may allow the FCC to consider broadband as part of a bundle of Title II telecommunications services to be supported with USF funds pursuant to other statutes.

4. Authority under Section 706

A promising source of authority might be found through § 706 of the Telecommunications Act of 1996.[43] In *In re Preserving the Open Internet* ("the 2010 Open Internet Order"), the Commission reinterpreted § 706 to give the Commission affirmative authority to create and enact measures that encourage the deployment of broadband.[44] This Order

[40] *See Verizon*, 740 F.3d 623.
[41] 47 U.S.C. § 254(c).
[42] See *Verizon*, 740 F.3d 623.
[43] Codified as 47 U.S.C. § 1302.
[44] 25 F.C.C. Rcd. at 17968-72.

was upheld in *Verizon*, where the D.C. Circuit found that the FCC has the authority to change their interpretation of § 706 and that the FCC's interpretation was reasonable.[45] However, the court did not unilaterally accept every provision in the 2010 Open Internet Order and instead vacated two provisions on the basis that they subjected broadband providers to common carrier treatment.[46] As such, it seems that whether § 706 authority can be used relies on the classification of the type of regulation being imposed. Here, since the FCC has once again classified internet broadband service as an information service, whether § 706 can be used as authority for the Lifeline program will ultimately depend on whether Lifeline is considered a common carrier regulation.

Section 706 authority might apply because universal service and the Lifeline program are measures that encourage deployment of broadband in rural or otherwise uncompetitive areas. The language of the statute states that the FCC

> shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[47]

Advanced telecommunications capability here is defined as "high-speed, switched, broadband telecommunications capability."[48] The Lifeline program encourages the deployment of advanced telecommunications capability to areas unlikely to develop broadband access organically by promoting competition in the local market and removing barriers to infrastructure investment.

The Lifeline program removes barriers to infrastructure investment by subsidizing broadband subscribers thereby increasing the pool of overall subscribers. Lifeline was originally

[45] 740 F.3d at 636-40.
[46] *Id.* at 659.
[47] 47 U.S.C. § 1302(a) (emphasis added).
[48] 47 U.S.C. § 1302(d)(1).

enacted to provide communication services to low-income consumers by subsidizing their telephone bills.[49] Broadband service was added to the Lifeline program as person to person communications evolved to include services such as VOIP or instant messaging, so that the Lifeline program can continue to serve its objective.[50] In rural areas or low-income communities, broadband service may only be provided by one provider due to high costs and low returns creating a sort of natural monopoly. The Lifeline program subsidizes the cost for basic broadband service for qualifying households through state-designated ETCs.[51] By establishing a uniform, low-cost subscription fee for broadband, Lifeline allows qualifying households to choose their choice of broadband provider, both wired and mobile, introducing competition into the market. In fact, the FCC has already used § 706 authority stating that "providing support to service providers to subsidize low-income consumers' purchase of [broadband] helps achieve our 706 objective of 'removing barriers to infrastructure investment.'"[52] Furthermore, in *Verizon*, the D.C. Circuit found support for using § 706 authority for the regulation of broadband because of a "triple-cushion-shot" theory that would promote broadband deployment.[53] Similarly, a triple-cushion-shot theory can be applied here: subsidizing the cost of broadband for low-income subscribers would encourage more users to subscribe to broadband which would ultimately "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[54]

The Lifeline program also works to offset the costs incurred from requiring telecommunications service in high cost areas thus promoting access to advanced

[49] *Lifeline Program*, *supra* note 11.
[50] *Id.*
[51] *Lifeline Program*, *supra* note 11.
[52] *2016 Lifeline Order*, 31 F.C.C. Rcd. at 3977.
[53] 740 F.3d at 643-45.
[54] 47 U.S.C. § 1302(a).

telecommunications service for all Americans. In the 1985 Lifeline Order, the FCC justified establishing the Lifeline fund as a way to protect low-income consumers from increased telephone subscription costs.[55] In implementing universal service for telephone, the FCC required telephone companies to provide service at the same quality and rates to high-cost or rural areas.[56] However, telephone companies had to raise prices for all subscribers in order to help pay providing telephone service to these high costs areas.[57] The FCC, worried that the extra cost would cause low-income subscribers to disconnect from telephone service, established the Lifeline program to ensure low-income consumers could continue to afford telephone service.[58] Regulating broadband under the Lifeline program using § 706 authority can thus be justified as not only providing increased access to essential broadband services for low-income residents, but also a way to promote advanced telecommunications capability deployment to high cost areas.

However, a flaw in using § 706 authority is that Lifeline could be seen as a common carrier regulation. In *Verizon*, the D.C. Circuit found that the definition of what constitutes a "common carrier" in the Communications Act to be of little help and instead relied on common law interpretations of the term.[59] In particular, the court defined common carriers as services that hold themselves out to the public indiscriminately and non-common carriers to be services that make individualized decisions for particular cases on the terms.[60] This definition was found to have been applied by the Supreme Court in the case *Midwest Video II*.[61] Based on this definition, however, it would seem that the Lifeline program could be considered a common carrier

[55] *MTS and WATS Market Structure; and Establishment of a Joint Board*; Amendment, 50 Fed. Reg. 939, 941-42 (1985).
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] 740 F.3d at 650-52.
[60] *Id.* at 651.
[61] *Id.* at 651-52 (citing *FCC v. Midwest Video Corp.* ("*Midwest Video II*"), 440 U.S. 689 (1979)).

obligation on broadband providers for two reasons. First, Lifeline does not regulate facilities and regulates telecommunications service directly. Second, Lifeline enforces a uniform policy for how broadband providers must provide services to those within the program.

The Telecommunication Act's universal service provisions all fall under Title II of the Act which refers specifically to common carriers. In § 254(c), universal service is directly defined as "an evolving level of telecommunications service."[62] This is in contrast to the principles of universal service detailed in § 254(b) which refer to providing "advanced telecommunications and information services."[63] In *Computer II*, a distinction was made separating what constituted common carrier basic services (telecommunications services) and what constituted enhanced services (information services).[64] Furthermore, in *In re FCC 11-161*, the Tenth Circuit found that universal service could not be applied to broadband as an information service, but instead allowed the FCC to regulate telecommunications "facilities" to provide broadband services through the CAF.[65] However, as stated above, unlike the CAF, Lifeline does not subsidize ISP broadband infrastructure development, but instead directly subsidizes broadband subscriber costs. Thus, it is unreasonable to assert that Lifeline only regulates "facilities" instead of the service itself—and regulating services is a common carrier regulation.

Finally, Lifeline directly regulates the cost of telecommunications service for qualified subscribers, therefore making it a common carrier regulation. This type of universal service program is built to accompany common carrier services. Services such as the postal service or the highway system are all examples of common carriage services with universal service

[62] 47 U.S.C. § 254(c)(1).
[63] 47 U.S.C. § 254(b)(2).
[64] *Re Second Computer Inquiry* ("*Computer II"*), 77 F.C.C.2d 384 (1980).
[65] 753 F. 3d. at 1047-48.

components where the government subsidizes the terms uniformly. Universal service for telecommunications first arose from the Bell system's six-word slogan: "one system, one policy, universal service."[66] It was designed around the idea that everyone in the U.S. should have access to the same telephone service with the same level of quality. This sentiment was echoed in the Telecommunications Act where Congress mandated that telecommunications and information services be provided in uncompetitive rural areas at comparable rates to those of urban areas.[67] Lifeline accomplishes this by enforcing a uniform cost for Lifeline broadband subscribers by subsidizing the cost of the subscription. In effect, Lifeline places a common carrier restriction on the broadband service provider, requiring the provider offer broadband services indiscriminately. If Lifeline includes broadband, the D.C. Circuit may consider it a common carrier restriction on broadband service providers that is not supported by § 706 authority.

### C. Question 4: Are there any other aspects of the Lifeline program that go for/against the FCC's decision to reclassify broadband as a Title I information service?

Communication and availability to the free market of ideas is a foundational hallmark of democracy and society in the United States. In fact, the FCC was founded on this very ideal:

> "to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication."[68]

[66] Matthew Lasar, *How AT&T Conquered the 20th Century*, ArsTechnica (Sep. 1, 2011), https://arstechnica.com/tech-policy/2011/09/how-att-conquered-the-20th-century/2/.
[67] 47 U.S.C. 254(b)(3) (describing a principle of universal service).
[68] The Communications Act of 1934, 47 U.S.C. § 151 et seq. (founding the Federal Communications Commission).

The Lifeline program embodied this founding ideal, helping to extend communication abilities to low-income persons and households across the nation. The Lifeline program has subsidized service for decades, supporting *availability* and *access* to members of society who otherwise would not have been able to afford them. Through the years, the tools that support these services have changed from the advent of telephone to now widespread use of the internet. In the past, Lifeline supported both of these mediums as they grew. Now, however, with the proposed reclassification of broadband as an information service and the downscaling of support for telephone subsidies, Lifeline will all but cease to exist, leaving many millions without access or the resources to communicate with others and interact with our society.[69] Losing the Lifeline program would disproportionately affect the country's most weak and vulnerable, including many ethnic minority communities and native tribes.[70]

In the end, the FCC can find many creative sources of authority to classify and reclassify broadband, under information services or other prongs throughout the decades. What is of paramount importance for our society, and what sits at the very foundation of the FCC, is that *access* and *availability* of communications services remains available to all in our society. Today, this equal access and availability only exists when all of society is able to interact both over the telephone and over the internet. The Lifeline program is the only FCC program that promotes *access* and *availability* for low-income consumers, but this very program is jeopardized by the FCC's decision to reclassify broadband. Reclassification of broadband under information services, as the order currently sits, could essentially disband the Lifeline program

[69] *See Program Data: Lifeline Participation*, Universal Serv. Admin. Co., https://www.usac.org/lifeline/learn/program-data/ (last accessed April 18, 2020).
[70] *See* Daniel Ackerberg, *et al.*, *Estimating the Impact of Low-Income Universal Service Programs*, US Census Bureau Ctr. for Econ. Stud. (2013), http://dx.doi.org/10.2139/ssrn.2286294.

with no substantial replacement. This erasure of *access* to and *availability* of communications for a large portion of our society, especially those with low income, goes against the purpose of the FCC and must be considered.

## III. Conclusion

While authority under § 254(e) is unlikely to persuade the D.C. Circuit to allow the FCC to continue providing broadband internet access through Lifeline, other sources of authority may prove to be more persuasive. In particular, section 706 authority has been used to justify providing broadband in other universal service contexts. However, the COVID-19 pandemic demonstrated the absolute need for internet connectivity in modern American society. When employment, public schools, and even basic social interactions require a strong internet connection to operate, the internet is starting to look more like a basic service that must be made available to all Americans. For many people, the Lifeline program is the only means of connecting to this basic, vital service. While the FCC can attempt to persuade the courts that its regulatory powers over universal service extend to broadband, the fundamental issue is that the classification of broadband as an information service fails to reflect how modern society uses broadband internet.

Respectfully Submitted,

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